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Supreme Court, U.S.
FILED

98 1603 NOV 16 1998

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No. _____

IN THE

Supreme Court of the United States

October Term 1998

ROBERT M. LATHROP AND
VELMA J. LATHROP,
husband and wife

Petitioners

v.

DAVID HANCOCK

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT M. LATHROP AND
VELMA J. LATHROP
PETITIONERS
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OCALA, FL 34479
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50cp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a police officer who assists and aids in an unlawful seizure of the plaintiffs' business property is entitled to qualified immunity in a civil action for violation of the plaintiffs' Fourth Amendment rights on the basis of a reasonable belief his actions were lawful?

II. Whether a police officer who enters into collusion with a private party to assist and aid in an unlawful seizure and subsequently does assist and aid that private party in the unlawful seizure of the plaintiffs' business property is entitled to qualified immunity in a civil action for violation of the plaintiffs' Fourth Amendment rights on the basis that his actions did not violate any clearly established law when This Court has unanimously ruled to the contrary?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Robert M. Lathrop
Velma J. Lathrop
Cottage Industries, Inc. (No parent or subsidiary companies)
David Hancock

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The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

BASIS FOR JURISDICTION

Rule 14(e)

(i) On June 3, 1998, the Circuit Court entered an Opinion which Affirmed the District Court's order granting summary judgment in favor of the defendant-respondent. Acopy of that decision appears at Appendix A.

(ii) On August 18, 1998, the Circuit Court entered an Order denying the Plaintiffs' timely request for rehearing and rehearing en banc. A copy of that order appears at Appendix D.

(iii) Under 28 U.S.C. §1254(1) This Court has jurisdiction to review on a writ of certiorari the judgment in question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(i) Fourth Amendment of the United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

(ii) 42 U.S.C. §1983 (1981):

Every Person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is a civil action brought pursuant to the Civil Rights Act, 42 U.S.C. §1983 by plaintiffs Cottage Industries, Inc., Robert M. Lathrop and Velma J. Lathrop, husband and wife. Their complaint alleged that David Hancock, a police officer in the City of Ocala, Florida, on the request by a private party "to prevent problems with the Lathrops" during an unlawful seizure of business property belonging to the Lathrops, prevented Mrs. Lathrop, who was alone at the business, from exercising her common law right to resist the unlawful seizure of the Lathrops' business property, thereby aiding in the unlawful seizure which temporarily destroyed and permanently damaged the Lathrops' ability to carry on the business in which they were lawfully engaged. Their complaint further alleged:

> "These intentional actions by Hancock resulted in a deprivation of the Plaintiffs' constitutionally guaranteed right to be secure in their person and effects and free from unreasonable property seizures by use of governmental authority, and Velma J. Lathrop's liberty rights protected by the Fourth Amendment to the United States Constitution." (R3, p. 4, ¶ 23)

In the District Court Officer Hancock moved for the granting of summary judgment on various grounds, including:

> "That Defendant Hancock is entitled to qualified immunity as the law in this case was not clearly established or Defendant's actions were objectively reasonable and taken in good faith."

A principal basis for Officers Hancock's argument that he was entitled to qualified immunity rest on his contention that:

> "On December 8, 1992, the Supreme Court for the first time determined that law enforcement officers assistance in a wrongful repossession of property violated the Fourth Amendment of the Constitution. Soldal v. Cook County, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). It was then, *and only then*, that the law on this point became 'clearly established.' " (emphasis added) (R16, p. 8)

The District Court, not only accepted this argument, but expanded it, concluding: "Even if ['the Defendant aided in the taking of the property'], however, he "is entitled to qualified immunity" (App., p. 47, n. 1) because "it is apparent that the law was not,

and in fact still is not, clearly established with regard to the Plaintiffs' allegations." (App., p. 38) (emphasis added) On that basis the District Court granted his motion and entered judgment in favor of Officer Hancock.

Accordingly, on April 23, 1997 the Plaintiffs filed a Motion for Reconsideration which, through an exhaustive examination of applicable case law, demonstrated that the Defendant's actions did violate clearly established law, were not reasonable, and constituted participation in the taking of the property, concluding: The error of order granting summary judgment was such that "the interests of justice demand correction." Prudential Securities, Inc. v. Emerson, 919 (11th Cir.) F.Supp. 415, 417.

The District Court denied that request for reconsideration, concluding: "Even if the facts indicated collusion between the Defendant and Pinto" (App. p. 44) Officer Hancock was still entitled to summary judgment.

Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit arguing that Soldal did not claim to establish new law, but to *reaffirm* This Court's previous decisions and that the plaintiffs presented sufficient factual evidence of conspiracy between Officer Hancock and the private parties to foreclose summary judgment. The Circuit Court, in an unpublished opinion, did not address the issue of the unlawfulness of Officer Hancock's alleged actions, but did find:

> "The district court properly concluded that Hancock could reasonably believe that his conduct was lawful, *see Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir. 1992), and therefore Hancock was entitled to qualified immunity." (App., p. 31)

Plaintiffs filed a suggestion of rehearing and rehearing en banc to amend the finding to more closely conform with decisions of other circuits and This Court. That request was denied.

FACTS[1]

[1] Since this case is on appeal from the grant of summary judgment, the facts are taken from the depositions, sworn statements, affidavits and papers before the District Court with all factual inferences taken against the moving party and in favor of the opposing party. Addickes v. Kress and Co.,

BACKGROUND FACTS

The facts essential to this case are almost entirely undisputed.[2] On or about October 11, 1991, the Lathrops purchased an existing business from Miracle Life Christian Center, Inc. ("Miracle Life") which had purchased it from the original owners and founders, Tammy Garst Pinto ("Ms. Pinto") and her father, Keith Garst. (App., pp. 33-34) Michael Lowery ("Lowery"), president of Miracle Life, told the Lathrops that Miracle Life had purchased the business for cash and it had no debts other than those disclosed and a bulk sales affidavit indicated "his title to said business has never been questioned, and he knows of no reason why it might be questioned; that there are no liens of record or otherwise," . . . "or any pending action, including tax appeals, affecting title." (R31, p. 99)

Within days of purchasing the business, the Lathrops began receiving notices from numerous creditors, including taxing authorities, demanding payment on past due balances. One such creditor was Apple Leasing ("Apple") demanding payments be caught up on the lease of a McIntosh computer that was included in the sale of the business as a temporary assumption with an option to make that lease assumption permanent at the end of 90 days. (App., p. 33) The Lathrops attempted to contact Lowery to have their purchase contract set aside since they felt they had been deceived by Lowery's misrepresentations.

From Apple, the Lathrops learned Ms. Pinto was the original owner of the business and had personally guaranteed payment on the lease. The Lathrops contacted Ms. Pinto to inform her of the situation with the lease so she could make arrangements to protect her interests in the event the Lathrops chose not to assume the balance of the lease. At that time Pinto advised the Lathrops that Lowery had not paid her cash, and Miracle Life was behind in its payments. In fact, weeks earlier, she had notified Miracle life of her intent to repossess the business based on that default. (App., p. 34).

After contacting Ms. Pinto, the Lathrops were even more de-

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398 U. S. 144, 158-159, 90 S.Ct. 1598, 1609 (1960)

[2] Petitioners can support their statement of facts almost entirely with Officer Hancock's police reports, sworn statement and deposition testimony.

sirous of having their contract with Miracle Life set aside, but their continued efforts to contact Lowery brought no response. Meanwhile, Ms. Pinto unilaterally decided to send Apple a check to make up some or all of the back payments and phoned the Lathrops to say she was making arrangements to travel from her home in North Carolina to repossess the business. However, the Lathrops had found the contract Ms. Pinto had signed with Miracle Life and reminded her that contract had assigned the lease to Miracle Life and did not grant her a security interest, Miracle Life was free to sell the business and she had no right to repossess the business from the Lathrops. (R31, 86) They further advised Ms. Pinto to get a judgment against Miracle Life so that, if the Lathrops were successful in having their purchase of the business reversed, she could repossess it or, in the event they were not successful, she could attach the Lathrops' payments to Miracle Life. Ms. Pinto said she would be in town in a few days to straighten everything out. (App., p. 34)

Upon arriving in Ocala, Ms. Pinto went to the Lathrops' business and introduced herself. She soon informed the Lathrops that she was just going to pick up "her equipment" and go home. The Lathrops reminded her that she had no right to repossess it, and she should obtain a judgment against Miracle Life. (App., p. 34)

On October 29 or 30, 1991, Ms. Pinto accompanied Mrs. Lathrop to the State Attorney's Office to present their complaints and they met with Assistant State Attorney Pat Jackson ("Jackson"). Officer Hancock states that Jackson said at that meeting , "the contract was ambiguous enough to where it could be believed that Ms. Pinto did have somewhat of a Lien on the business." (R31, p. 3). That opinion, combined with Ms. Pinto's notice to Miracle Life of her intent to repossess the business, led Jackson to conclude there was a question of whether this constituted an encumbrance which Lowery fraudulently concealed from the Lathrops, which conclusion he later discussed with Officer Hancock.. (R31, p. 22). Jackson advised the women to contact the police to have their complaints investigated. Jackson also advised them to consult an attorney to determine ownership of the business as the State Attorney's Office only handled the criminal aspects of the case. (App., p. 34)

The Lathrops and Ms. Pinto, following Jackson's advice, made

an appointment to speak with with an attorney and called the police so an investigation could be made. The case was initially assigned to Officer Scaglione who interviewed Mrs. Lathrop, Ms. Pinto and John Welch, ("Attorney Welch"), the attorney who handled Miracle Life's sale of the business to the Lathrops. Sergeant Morrison, Officer Hancock's boss, also spoke with Attorney Welch. (App., pp. 34-35)

On Friday, November 1, 1991, Officer Hancock was assigned to the case. His first action was to receive a written statement from Sergeant Morrison which conveyed the opinion of Attorney Welch that the sale of the business was legal, that Pinto's complaint was civil and could be easily remedied by setting up an escrow account, and that Attorney Welch would contact Investigator Darley the following week to verify that Ms. Pinto's complaint had been resolved. Officer Hancock signed that statement. (R31, p. 29). That same day, he interviewed Mrs. Lathrop and Ms. Pinto and concluded "there was an intent on the part of the suspect to defraud the Victim Lathrop & possibly Pinto as well." That same day he also obtained a warrant for Lowery's arrest on the charge of grand theft for defrauding the Lathrops, (R31, p. 33), but "found out [Ms. Pinto's] case was pretty much civil." (R31, p. 4).

While Officer Hancock was obtaining the warrant, the Lathrops and Ms. Pinto were meeting with Attorney Dennis Camp ("Attorney Camp") who advised them the Lathrops appeared to be the rightful owners of the business, but that Ms. Pinto's contract was binding and she was not without rights. Once again Ms. Pinto expressed her desire to just load up "her" stuff and go. Attorney Camp supported Mr. Lathrop's opinion that she could not do that. He agreed to review the contracts, research the law and give them his professional opinion the following Monday. (App., p. 35)

Monday afternoon Mrs. Lathrop called Attorney Camp. Ms. Pinto and Mr. Lathrop listened on the speaker phone while Attorney Camp confirmed his initial opinion that the business belonged to the Lathrops. He suggested several proposals that could be submitted to Miracle Life to resolve the situation. Each of those proposals provided for Ms. Pinto to be paid in full by placing any moneys due Miracle Life from the Lathrops into an escrow account. (R37, p. 1)

THE INCIDENT

Shortly after the conversation with Attorney Camp, Officer Hancock arrived at the Lathrops' business. Ms. Pinto complained to him that she just wanted to pick up "her" stuff and go home. Mrs. Lathrop reminded her that she could not do that. Though Jackson denies having given him this advice,[3] Officer Hancock then said that, according to Jackson at the State Attorney's Office, if Ms. Pinto wanted to take the business property that it was hers. Though his deposition testimony is that Jackson never specifically told him Ms. Pinto could remove the property, (R20, pp. 21-24), Officer Hancock told Mrs. Lathrop that Ms. Pinto had a right to take it. (R31, p. 5) A brief argument took place in which Mrs. Lathrop told Officer Hancock that Jackson had said no such thing and reminded him that Jackson specifically said the State Attorney's Office would not get into the question of legal ownership and told them to see a civil attorney about that, and then told him that attorney had just advised Ms. Pinto that removing any property without permission would be theft.[4] (R37, pp. 1-2) (R31, pp. 13, 100-101). Officer Hancock quit arguing and left.

Ms. Pinto says she then went to see Officer Hancock privately, and asked him,

> . . . "if I go in there in the morning and I get a U-Haul and I start taking the things that I...that belonged to me that were there before, when the Lathrops purchased the business, is this...are they going to try and get an injunction, or they going to stop me, is it going to be a waste of my time, and he said no." (R31, p. 14)

Officer Hancock adds these significant details:

> "she asked me if I would go down to the business with her to get that. I said well that's not really necessary. I don't think you'll have any problem. Um...if you do have a problem just call a uniformed police officer and he'll come and stand by while you do that. Um...she wanted me to come instead. ..." (R31,

[3] In fact, Jackson denies even discussing the subject. (R31, p. 22).

[4] Officer Hancock's sworn statement shows that he made reference to this argument at the time of the incident. (R31, p. 5)

pp. 4, 5)

Although Officer Hancock's testimony is that: 1) he had no knowledge of a court order authorizing the seizure, (R20, p. 30), 2) a police officer would not be able to help Ms. Pinto seize the property, (R33, p. 62), 3) a police officer had no authority to seize property under those circumstances, (R20, pp. 29-30), 4) he had never received any specific advise from the State Attorney's Office that Ms. Pinto could remove property from the Lathrops' business,[5] (R20, pp. 21-24), and 5) his police report indicates he knew that Attorney Welch was working through Investigator Darley to resolve Ms. Pinto's complaint, (R31, 29), the next morning he went to the Lathrops' business under the pretext of gathering evidence to support a charge against Lowery for writing bad checks.[6] Shortly thereafter, Pinto arrived and the property was seized in just the manner they had discussed.

> "While I was there, Ms. Pinto arrived in a moving van and she came in and informed Mrs. Lathrop that it was her intent to remove her property and head on back North. Mrs. Lathrop resisted, said no I'm not going to let you and she looked to me for assistance. I told her, I said its . . . it's her property, uh. . . she has a right to it. I told you that yesterday, we talked to the State Attorney, um. . . I can not keep her from taking her property. Um. . . she said, well I can I lock the door and um. . . call my attorney. I said you can call your attorney but you can't keep her from taking her property. She called Mr. Jackson. . ."

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[5] Jackson has also sworn he never told anyone that Ms. Pinto could remove property from the Lathrops' place of business, (R31, p. 22)

[6] Though Officer Hancock argues this was his *only* reason for being present, he has testified that he never filed a police report on that bad check case. (R33, pp. 69-70) The sequence of events, including Ms. Pinto's request that he be present, his subsequent presence, and his actions while present, combined with Ms. Pinto's testimony that "he knew I was going to be there" and that if Officer Hancock testified that he declined to be present, "that would surprise me" (R 21, pp. 41-42) and the lack of a police report on the bad check case create "an issue of fact as to what his motives might have been" Adickes v. Kress, supra, 398 U.S. at 157, 90 S.Ct. at 1608 (1970) and entitles the Plaintiffs to the reasonable inference that his real reason for being present was to prevent the Lathrops from giving Ms. Pinto any trouble.

Officer Hancock's statement of facts cites testimony that when Mrs. Lathrop tried to stop Ms. Pinto "Hancock responded not to give her any trouble and to stay behind the counter." (R17, p. 4)[7]

Although Mrs. Lathrop obeyed Officer Hancock's direct order and stopped physically resisting Ms. Pinto's removal of property, she did not acquiesce to the search. Officer Hancock acknowledges she continued to resist the unlawful seizure by calling the Ocala Police Department to report a crime (R33, p. 49) and also. . .

> "Mrs. Lathrop called Mr. Jackson.". . . "and from the jest [sic] of her conversation, I got the idea that she could lock the door and keep out Ms. Pinto." (R31, p. 5)
>
> Officer Hancock asked to speak to Jackson ,who told him. . . "DH:". . . "when Mrs. Lathrop told her to leave, Ms. Lathrop revoked Ms. Pinto's right to be inside the business[8] at that time therefore, Ms. Pinto has to leave and come back and her . . . go get a writ of Replevin, bring it back to her and obtain her property that way. Uh in the mean time, while I'm talking to him they had already removed the Apple computer. . ."
>
> "CP: Um. Huh.
>
> "DH: . . .when I found this out, everything was stopped. I told them what they had to do and they went to the Courthouse to get a Writ of Replevin. Uh. . . and they still had the Apple computer but the Apple computer was never in dispute as far as ownership goes." (R31, p. 6)

Officer Hancock's statement that the Apple computer was never in dispute conflicts with his statement of undisputed facts which indicates Mrs. Lathrop attempted to refuse to allow Ms. Pinto to remove the computer. (R17, p. 6) And although Officer Hancock

[7] Officer Hancock's contention that he was merely "passing on information from Jackson," (R17, p. 6), not giving Mrs. Lathrop orders, is in conflict with his testimony that Jackson never told him that Ms. Pinto could remove the property without the Lathrops' permission or that Mrs. Lathrop could not lock her door or resist Ms. Pinto. (R20, pp. 21-23). It also conflicts with the sworn statement of Jackson who said "At no time did I say that the defender. . . or victim 2 could go in and get her property." (R31, p. 22)

[8] It is noteworthy that Officer Hancock does not say Jackson referred to any right of Ms. Pinto to remove property, but only her right to be inside the business.

says that only property indisputably Ms. Pinto's was taken, his police report of the incident tells quite another story. "On the computer, however, is business for the Lathrops stored on the hard drive, that they no longer have access to." (R31, p. 31) Officer Hancock knew Ms. Pinto was removing property that belonged to the Lathrops and his sworn statement indicates he knew Ms. Pinto intended to take, not only the Apple computer but also some photographic equipment and anything else she wanted, renting a U-Haul truck to do so. (R31, p. 5). Even after Jackson advised him the seizure was unlawful, Officer Hancock allowed Ms. Pinto to leave, taking with her property he knew belonged to the Lathrops.

Along with the Apple computer, Ms. Pinto and her friends removed every computer disc for the Apple computer, including all application software, type fonts, and customer files, including work in progress, and program discs required to operate a phototypesetting machine, thereby completely destroying the Lathrops capacity to operate their business. A few days later Ms. Pinto returned some diskettes containing older customer files, along with the program discs for the phototypesetting machine and a few miscellaneous items. All of the programs and type fonts for the Apple computer, and most of the customer files were never returned. (R36, p. 10)

SUMMARY

For reasons known only to Ms. Pinto, she rejected the prospect of receiving the balance of the monies due her and decided, instead, to ignore her own attorney and seize the business equipment in the Lathrops's possession. For reasons known only to Officer Hancock, he agreed to help, despite his knowledge that he had no legal authority to assist her and Ms. Pinto's civil complaint was being resolved by Attorney Welch and investigator Darley. Officer Hancock used some bad checks written by Lowery to justify his presence at the prearranged time and tried to create an implication within Jackson's comments about the case to justify restraining Mrs. Lathrop. He disregarded the explicit opinions of Attorneys Welch and Camp and ignored the fact that Jackson had said the ownership of the business property was a civil matter that the State Attorney's Office would not get involved with, and refused Mrs.

Lathrop's reasonable request to call to confirm his belief that the seizure was lawful before allowing anything to be removed. During the seizure, Officer Hancock allowed Ms. Pinto to proceed as though possessing a general warrant, even to the point of allowing her to remove property which he knew belonged to the Lathrops. Even after Jackson advised him that the seizure was unlawful, he allowed Ms. Pinto to leave with property which he described at the time as belonging to the Lathrops.

ARGUMENT

I. The Eleventh Circuit's holding that the police officer was entitled to summary judgment on the basis of qualified immunity is an unprecedented expansion of the doctrine of qualified immunity and conflicts with the published opinions of other circuits and numerous prior decisions of This Court.

The Circuit Court's opinion that Officer Hancock is entitled to summary judgment on the basis of qualified immunity conflicts with the holdings of the Fifth and Seventh Circuits and previous rulings of the Eleventh Circuit. This Court unanimously declined to review an en-banc decision of the Seventh Circuit that denied summary judgment under similar circumstances.

> "The Court of Appeals found that because the police prevented Soldal from using reasonable force to protect his home from private action that the officers knew was illegal, there was sufficient evidence of conspiracy between the private parties and the officers to foreclose summary judgment for respondents. We are not inclined to review that holding. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152-161, 90 S.Ct. 1598, 1605-1610, 26 L.Ed.2d 142 (1970)" Soldal v. Cook County, 506 U.S. 56, 61 n. 6 113 S.Ct. 538, 543 n. 6, 121 L.Ed.2d 450 (1992)
>
> This Court further agreed with the Seventh Circuit stating:
>
> "the [Fourth] Amendment's protection would be triggered 'by a search or other entry into the home incident to an eviction or repossession,' 942 F.2d at 1077.[12]
>
> "[12] This was the view expressed by the Court of Appeals for the Tenth Circuit in *Specht v. Jensen*, 832 F.2d 1516 (1987),

remanded on unrelated grounds, 853 F.2d 805 (1988) (en banc) with which the Seventh Court expressly agreed. 942 F.2d at 1076." Id., 506 U.S. at 67, 113 S.Ct. at 546-547.

It is the Fifth Circuit decision in Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (1980), however, that should have been particularly instructive to Officer Hancock, the District Court having acknowledged that it would be binding on the instant case. (App., p. 45). Menchaca reviewed police officers' actions during a repossession of a Chrysler automobile. Chrysler's agents had notified Mrs. Menchaca that the car would be repossessed at a particular time. Arriving at the Menchacas' address at the disclosed hour, the repossessors found the car parked on the street and commenced hooking it to a tow truck. When that process was nearly completed, Mr. Menchaca observed the men's actions and ran outside to prevent the repossession.[9] Using loud and abusive language, Mr. Menchaca confronted the repossessors. The police were called because of the disturbance. Menchaca, supra, 613 F.2d at 509-510.

Two police officers were dispatched to check out the disturbance. There was some discussion, Mr. Menchaca calmed down, and the police officers left with the car still hooked to the winch. The Menchacas then retrieved some belongings from the car and the repossessors left with the car. The Menchacas subsequently filed a §1983 action based upon their claim that "they gave up possession of the car because the police had led them to believe they had no choice." Id., at 511.

Judge Garza, in his dissent, wrote:

> "If the conduct alleged did in fact occur, the Laredo police department would be wise to train its officers to intervene neutrally where necessary to prevent a breach of the peace, but certainly not to aid the self-help repossessor. For the reasons stated above, *I believe action to the contrary is an outrage, and squarely within the ambit of §1983.*" (emphasis added) Id., at 516.

to which the Opinion responded:

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[9] Mrs. Menchaca had been personally notified of the repossession, but, apparently, had not disclosed this fact to her husband.

> *"We agree with the dissent's contention that police intervention and aid in this repossession by defendant Chrysler's agents would constitute state action*; however, the testimony failed to show such intervention and aid." Id., at 513. (emphasis added).

While upholding the dismissal of the case by the lower court due to a lack of credible evidence to support the claim, Menchaca clearly established that, in the Fifth Circuit, of which Florida was then a part, police officers are subject to §1983 liability if they assist in a self-help repossession. Menchaca also indicated that summary judgment would not be appropriate, saying:

> "We wish to emphasize that this case was not treated by the district court as a summary pretrial disposition as the dissent contends." Id., at 512.

In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted the decisions of the Fifth Circuit as precedent. On two separate occasions, the Eleventh Circuit has cited Menchaca as establishing that police assistance in a self-help repossession "could constitute police 'intervention and aid' sufficient to establish state action." Booker v. City of Atlanta, 776 F.2d. 272, 274. (1985) (See also Cofield v. Randolph County Commission, 90 F.3d 468, 471) (1996) In Booker the Eleventh Circuit also concluded, regarding the City of Atlanta, "summary judgment at this point is improper." (Booker, supra, at 274).

> "Even if a jury were to find that Couvillion did not actively assist with the repossession, [(footnote omitted)] it nevertheless could find that Couvillion's arrival with the repossessor gave the repossession a cachet of legality and had the effect of intimidating Booker into not exercising his right to resist, thus facilitating the repossession. Even if unintended, such an effect could constitute police 'intervention and aid' sufficient to establish state action. *See Menchaca*, 613 F.2d at 513" (citations omitted) Id., at 274.

However, Officer Couvillion was entitled to summary judgment, because: "Couvillion properly alleged good faith in his answer and Booker has offered no evidence to rebut his claim." Id., at 274

Officer Hancock has claimed he reasonably believed his ac-

tions were legal, citing: 1) Ms. Pinto's contract with Miracle Life. (R31, p. 86). 2) His conversations with Jackson. (R16, p. 5). 3) The law was not clearly established at the time of the incident. (R16, p. 1). 4) He reasonably believed his actions were lawful because they did not constitute "intervention and aid." (R16, p. 5). And, 5) He did not view the incident as a repossession, but a retrieval of Ms. Pinto's own property. (R16, p. 5).

The Petitioners have rebutted those arguments with: 1) Pinto's contract contains no clause indicating any such right.(R31, p. 86). 2) Officer Hancock's own testimony that Jackson gave him no specific advice that Ms. Pinto could remove the property from the Lathrops' business, (R20, pp. 22-23), and Jackson's denial of ever having given such advice. (R31, p. 22). 3) The law was clearly established by Menchaca. (R30, p. 9). 4) Menchaca found that spontaneous actions by police officer's arriving at the scene for the sole purpose of keeping the peace would violate the law if the police officers acted "in concert" with the repossessors in a manner that would "aid in this repossession." Menchaca, supra, at 511-513 (R41, pp. 4-5). And, 5) Even after the seizure Officer Hancock stated "Ms. Pinto decided she would go and *repossess* it." (emphasis added) (R31, p. 3). Also, Officer Hancock's own testimony attests to the fact that he knew his actions were unlawful at the time of the incident.[10]

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[10] When confronted with his sworn statement that he had told Ms. Pinto, "If you do have a problem just call a uniformed patrolman," Officer Hancock responded,

> "A. (Shakes head from side to side.) No. That would -- no, I don't know what I was referring to. Uniformed patrolman would -- he would tell her that he couldn't help probably.
>
> "Q. So it really wouldn't do her any good to call a uniformed patrolman?
>
> "A. Only if they were having a fight or something would they call a uniformed patrolman. He could break up the fight and disburse [sic] the two. I really don't know." (R33, p. 62)

Officer Hancock also testified that "We don't seize property. That's something the Sheriff's office would do." (R 20, p. 29) and he knew of no circumstances other than with a warrant or with probable cause relating to an arrest that allowed police officers to seize property. (R20, p. 29-30)

In affirming the District Court's awarding summary judgment, the Circuit Court cited Hardin v. Hayes, 957 F.2d 845, 848 (11th Cir. 1992) (App., p. 31) which involves, not a repossession, nor even a seizure, nor any other affirmative act, as alleged in the instant case, but the negligent delay in obtaining mental health treatment by police officers and other officials for a prisoner in custody who committed suicide by ingesting a bar of soap.

The citation of Hardin v. Hayes ignores the difference between negligent failure to act and taking affirmative action.

> "Petitioner's claim, based on respondents' negligence, is quite different from one involving injuries caused by an unjustified attack by prison guards themselves, see *Johnson v. Glick*" (citations omitted) "or by another prisoner where officials simply stood by and permitted the attack to proceed. see *Curtis v. Everette*" (citations omitted) Davidson v. Cannon, 474 U.S. 344, 348, 106 S.Ct., 668, 670-671 (1986).

The Circuit Court's affirming Officer Hancock's entitlement to summary judgment is a sharp departure from their own decision in Hartfield v. Lemacks, 50 F.3d 950 (11th Cir. 1995) in which it held that a deputy sheriff, Mike Newton, who "obtained a search warrant for the residence at 5108 Middlebrooks Drive" and "the next day"... "erroneously led other law enforcement agents to 5128 Middlebrooks Drive to execute the search warrant" and "forcibly opened the side door using a battering ram" was not "protected by qualified immunity" (Hartfield, supra, at 951-952) because:

> "At the time of the officers' entry into the Hartsfields' home, it was thus clearly established law that, absent probable cause and exigent circumstances, a warrantless search of a residence violates the Fourth Amendment, unless the officers engage in reasonable efforts to avoid error." Id., at 955.
>
> "Newton's actions in this case were simply not 'consistent with a reasonable effort to ascertain and identify the place intended to be searched' as dictated by *Garrison*. See id. at 88-89, 107 S.Ct. at 1019." Id., at 955.

Deputy Newton had the search warrant in his possession, but "did nothing to make sure that he was leading the other officers to the correct address." Id., at 955.

In the instant case, Officer Hancock lacked a search warrant or court order of any kind; knew two attorneys had stated that the property legally belonged to the Lathrops; knew Jackson had advised Ms. Pinto and Mrs. Lathrop that the State Attorney's Office didn't get involved in civil matters; read over Ms. Pinto's contract that said she could pursue a legal remedy, not repossess, in the event of default; knew Attorney Camp had advised his client, Ms. Pinto, that to remove property from the Lathrops' business without permission would be a crime; has cited no exigent circumstances to negate the warrant requirement; planned the seizure in advance; and made no effort whatsoever to avoid error by obtaining explicit advice from Jackson as to whether Ms. Pinto could remove property from the Lathrops' business, despite having spoken with Jackson the previous day. Yet, the Circuit Court did not apply Hartfield which said:

> "absent probable cause *and* exigent circumstances, a warrantless search of a residence violates the Fourth Amendment, *unless* the officers engage in reasonable efforts to avoid error" Id., at 955 (emphasis added)

but instead affirmed Officer "Hancock could reasonably have believed that his conduct was lawful." (Order, p. 2).

Qualified immunity is an affirmative defense, (see Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924 (1980)), yet Officer Hancock has never cited any specific language in Ms. Pinto's contract which led him to believe the property was hers, nor any specific instruction from Jackson that Ms. Pinto was entitled to enter onto the Lathrops' property and remove it without their permission and over their objections. Though he claims Jackson told him the property belonged to Ms. Pinto, this conflicts with his specific statement that Jackson said not that Ms. Pinto owned the business property, but that. . .

> "Mr. Jackson was under the impression that the contract was ambiguous enough to where it could be believed that Ms. Pinto did have somewhat of a *Lien* on the business." (R31, p. 3) (emphasis added).

Officer Hancock was not an innocent bystander who made casual suggestions to Mrs. Lathrop and could reasonably believe he

did not intervene and aid in the unlawful repossession. He made a clear distinction between what Mrs. Lathrop could and could not do, and specifically told her she *could not* interfere with Ms. Pinto or lock the door , but she *could* call her attorney. Even the City Attorney for the City of Ocala, having heard all the evidence, concluded a jury would find Officer Hancock "used the force of his authority to prevent Ms. Lathrop from protecting her property." (R41, attachment, p. 2).

That reasonably competent police officers would have understood that Officer Hancock's actions were unlawful is confirmed not only by Officer Hancock's own testimony, but also by the officers in Menchaca who said "that repossession was a civil matter which did not concern the police." Menchaca, supra, at 511. This Court also observed that police officers would not often choose to engage in similar conduct, knowing it was unlawful. Soldal, supra, 506 U.S. at 72, 113 S.Ct. at 549.

This Court has ruled that, to be lawful, seizures made without a warrant must meet specific guidelines.

> "Time and again, this Court has observed that searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth amendment — subject only to a few specifically established and well delineated exceptions.' *Thomas v. Louisiana*, 469 U.S. 17, 19-20 (1984) (per curiam) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted)); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); see also *United States v. Place*, 462 U.S. 696, 701 (1983)." Minnesota v. Dickerson, 508 U.S. 365, 372, 113 S.Ct. 2130, 2135 (1993).

Although no evidence can be offered to dispute Officer Hancock's claim that he believed the property belonged to Ms. Pinto, that belief, in itself, does not justify a warrantless seizure.[11]

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[11] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.' *Beck v. Ohio*, supra, at 97." Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880 (1968)

This Court has also specifically ruled that state action to assist in repossessions based upon vague contractual statements, violate the "constitutional right to a preseizure hearing" and are unlawful. That ruling specifically addressed a Florida statute and self-help repossessions.[12] Officer Hancock could not reasonably have believed a warrantless seizure of property which the Lathrops had in their possession and were claiming ownership of was lawful.

The availability of qualified immunity to Officer Hancock rests not on the question of whether his subjective belief that Ms. Pinto was the undisputed owner of the business property was objectively reasonable (abundant evidence has been presented to show that it was not.), but rather whether Officer Hancock could have "reasonably believed that his particular *actions* comported with the constitutional command." Anderson v. Creighton, 483 U.S. 635, 655,

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. . . . "'[N]o amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor v. United States*, 286 U.S. 1 [(1932)]; *Johnson v. United States*, 333 U.S. 10 [(1948)]; *McDonald v. United States*, 335 U.S. 451 [(1948)]; *Jones v. United States*, 357 U.S. 493, 497-498 [(1958)]; *Chapman v. United States*, 365 U.S. 610 [(1961)]; *Trupiano v. United States*, 334 U.S. 699 [(1948)].' *Coolidge*, 403 U.S., at 468." Horton v. California, 496 U.S. 128, 137 n. 7, 110 S.Ct. 2301, 2308, n. 7 (1990)

[12] "The conditional sales contracts here simply provided that upon a default the seller 'may take back,' 'may retake' or 'may repossess' merchandise. The contracts included nothing about the waiver of a prior hearing. They did not indicate how or through what process - a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing - the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events. The appellees do not suggest that these provisions waived the appellants' right to a full post-seizure hearing to determine whether those events had, in fact, occurred and to consider any other available defenses. By the same token, the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind." Fuentes v. Shevin, 407 U.S. 67, 95-96, 92 S.Ct. 1983, 2002 (1967).

107 S.Ct. 3034, 3047 (1987) (emphasis added). Officer Hancock fails at every step in meeting This Court's standard for judging reasonableness.[13]

Whatever motivated Officer Hancock to violate the law, it is clear that he was not merely a hapless bystander caught up in a no-win situation. His own testimony is that in such a situation a police officer's proper role would be to disperse the two parties (R33, p. 62) or if he didn't know what to do, "you call a supervisor out." (R33, p. 123) Had Officer Hancock followed his own advise, considered the opinions of Attorneys Welch and Camp, listened to Ms. Pinto's concerns that the Lathrops might seek an injunction, *or* allowed Mrs. Lathrop to stop the whole thing until they got this cleared up, neither the Lathrops, the lower courts nor This Court would be troubled with this case. Instead he knowingly violated the law by

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[13] "In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? cf. *Carroll v. United States*, 267 U.S. 132 (1925); Beck v. Ohio, 379 U.S. 89, 96-97 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e. g., *Beck v. Ohio, supra*; *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959). And simple ' "good faith on the part of the arresting officer is not enough." . . . ' " . . . "Beck v. Ohio, supra, at 97." Terry, supra, 392 U.S. at 20-22, 88 S.Ct. at 1879-1880. (footnotes omitted)

stopping Mrs. Lathrop from locking her door, thereby assisting the unlawful seizure of her property which has led to this lawsuit.

The Circuit Court's affirming the granting of qualified immunity to Officer Hancock in an unpublished opinion may not seem of sufficient importance for This Court to review that holding. However, the Petitioners would contend that opinions which significantly depart from published precedent present a potentially greater threat when unpublished than when published. In order to intelligently decide whether to bring their complaints to court, plaintiffs would be wise to review the applicable caselaw of their circuit before filing their complaint. If their unpublished opinions represent a dramatic departure from their published opinions, the circuits could create an environment in which plaintiffs would be unable to intelligently determine the reasonableness of going to court.

The decision of the Circuit Court to affirm the granting of summary judgement to Officer Hancock not only strips the Petitioners of an expected protection, but creates a treacherous threat to future plaintiffs' good-faith decisions to assert their basic rights in court. Failing to keep unpublished opinions in line with published ones creates a significant risk that plaintiffs might well suffer greater loss by bringing an action in the good-faith expectation that they will be favorably heard, when, in fact, they will not, than the loss suffered as a result of the original unlawful act which led to the suit.

The Petitioners fully support This Court's position that law suits that can be settled should be settled. When judicial decisions are rendered uniformly and consistently settlement is much more likely as the results of litigation are much more predictable. The opinion of the Circuit Court conflicts with that policy by creating an uncertain judicial environment.

This opinion of the Circuit Court conflicts with Fifth and Seventh Circuit precedents, its own previously published opinion in Hartfield and the precedent of This Court in Addickes v. Kress (cited with unanimous approval in Soldal). In an opinion regarding a basic constitutional right, the Circuit Court has. . .

> "so far departed from the accepted and usual course of judicial proceedings" . . . "as to call for an exercise of This Court's supervisory power." (Supreme Court Rule 10(a)).

II. The Eleventh Circuit did not correct and has thus sanctioned the holding of the District Court that the plaintiffs' allegations do not constitute unlawful acts which violate the Fourth Amendment, which holding is an unprecedented limitation on the scope of the Fourth Amendment and conflicts with a unanimous decision of This Court.

Though specifically stating Menchaca, which found that "police intervention and aid in this repossession by defendant Chrysler's agents would constitute state action," Menchaca, supra, at 513, would be binding, (App., p. 45), and though Officer Hancock, himself, argued the law was clearly established by Soldal, (R16, p. 8), the District Court granted Officer Hancock qualified immunity based upon its finding that his alleged actions would not be unlawful, *even today*.

> "The Court seriously questions whether or not there was state action in this case. It is not at all clear to the Court that the Defendant aided in the taking of the property. *Even if he did*, however, he is entitled to qualified immunity." (emphasis added) (App., p.38, n.2).
>
> "Here, it is apparent that the law was not, *and in fact still is not*, clearly established with regard to the Plaintiffs' allegations." (emphasis added) (App., p.38).

Even after acknowledging that Ms. Pinto's seizure of the Lathrops' property was unlawful, (App., p. 38), the District Court further ruled:

> "*Even if the facts indicated collusion* between the Defendant and Pinto, summary judgment would still be appropriate since the Plaintiffs have simply failed to prove that the Defendant's actions violated clearly established law." (emphasis added) (App., p. 44).

Despite the Circuit Court's having adopted Menchaca as precedent and having confirmed that police "assistance and aid" in a repossession *would* violate the Fourth Amendment in both Booker and Cofield, the Circuit Court did not correct the finding of the District Court that it would *not* violate the Fourth Amendment.

The Petitioners would argue that, given the language of the District Court's orders, there are no facts, circumstances or law which

could be presented which would move the District Court to find a defendant police officer violated the Fourth Amendment by participating in an unlawful repossession. This effectively repeals the Fourth Amendment rights under the circumstances alleged in this complaint for those citizens within the District Court's jurisdiction.

The District Court was not persuaded by This Court's finding that evidence of conspiracy between the private parties and the officers would *foreclose summary judgment*, (See Adickes v. S.H. Kress & Co., 398 U.S. 144, 152-161 (1970)), nor This Court's recent unanimous affirmation of that holding. Soldal, supra, 113 S.Ct. at 543 n. 6) 506 U.S. at 61 n. 6 (1992).

In rejecting even Officer Hancock's concession that under Soldal the Plaintiffs' allegations constitute unlawful conduct, the District Court has demonstrated the principal: Res judicata facit ex albo nigrum; ex nigrum, album; ex curvo, rectum; ex rectum, curvum - A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked.

The ruling of the District Court, being in direct conflict with This Court's unanimous ruling in Soldal, "has so far departed from the accepted and usual course of judicial proceedings" and the Circuit Court in failing to correct that decision, has "sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" (Supreme Court Rule 10(a)) in order that once again in the Middle District of Florida white shall be white; black, black; crooked, crooked; and straight, straight.

REASONS FOR GRANTING THE PETITION

The Petitioners are confident that if their petition is granted, This Court will, in harmony with its past decisions, conclude that Officer Hancock is not entitled to qualified immunity for his blatantly unlawful acts. The question is: Does this case present an important federal question that calls for an exercise of This Court's supervisory power? The Petitioners believe it has significant value beyond the immediate relief sought by the Petitioners for the following reasons.

The exclusionary rule serves as a check to unreasonable seizures in criminal cases. (Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444 (1960)). The only deterrent the law-

abiding citizen has is the prospect of a §1983 action which causes the officer to "reflect" on the reasonableness of his actions before making the seizure. (See Malley v. Briggs, 475 U.S. 335, 343 106 S.Ct. 1092, 1097 (1986). This Court has ruled:

> "that the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon, supra, defines the qualified immunity accorded an officer." Id., 475 U.S. at 344, 106 S.Ct. at 1098.

"Well-intentioned but mistakenly over-zealous police officers" (Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)) engaged in criminal law enforcement have presented This Court with "numerous cases" where they have "taken matters into their own hands." (United States v. Jeffers, 342 U.S. 48, 52 (1951)) Though the reasonableness standard is the same in a civil context and it is a common practice to assign police officers to stand by during self-help repossessions,[14] the Petitioners could not find a single instance where This Court has had the opportunity to review such a case. This absence immediately suggests the question: Do "mistakenly over-zealous" police officers suddenly become "reasonably cautious" when assigned to stand by at a self-help repossession? The Petitioners think not.

Police officers enforce the law. They are not "neutral" as in the case of the magistrate, but rather are "engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369 (1948). When executing warrants, their proper role is to see that the warrant is complied with. When assigned to stand by during a self-help repossession, the situation is, to all outward appearances, the equivalent of executing a warrant. Further, in a self-help repossession the repossessor is claiming the debtor took merchandise or property for which he did not

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[14] The District Court in the instant case, (App., p. 38), the Sixth Circuit (Haverstick v. Financial Federal Credit, 32 F.3d 989, 995 (1994)), the Seventh Circuit, (Soldal v. County of Cook, 942 F.2d 1073, 1081(1991)), the Ninth Circuit, (Harris v. City of Roseburg, 664 F.2d 1121, 1127 (1981)), and the Eleventh Circuit, (Cofield, supra, 90 F.3d at 471 (1996)) all acknowledge the common practice of assigning police officers to stand by during self-help repossessions to keep the peace.

make proper payment. This is homogenous to the routine situation police officers deal with: a victim claims a suspect took his property and did not pay him for it. The police officer's role in such cases is to gather sufficient evidence to arrest the suspect and attempt to recover the victim's property. When assigned to a self-help repossession a "well-intentioned but over-zealous" police officer might be expected to perform that familiar role of law *enforcement*.

However, in a self-help repossession there is no tangible law (warrant or court order) to authorize a seizure of property. The police officer should be *enforcing* the self-help statute which does not allow the repossessor to remove property over the objections of the debtor and when the debtor objects the repossessor must resort to judicial process. A review of existing federal caselaw would reveal that police officers have not acted in harmony with that requirement, yet neither could the plainitffs find a single conviction of a police officer under §1983 for violating his proper law enforcement role during a self-help repossession.

Creditors routinely request police officers to stand by during self-help repossessions with the expectation that the police officer's presence will allow them to gain possession of the property they are seeking to repossess without having to bear the expense of judicial process. (See Booker, supra at 274). The creditor (the plaintiff in a replevin action) thereby shifts the burden of proof and the expense of prosecution from himself to the debtor. (Although the defendant in a replevin action, the debtor becomes the plaintiff in both an unlawful repossession case and a §1983 unlawful seizure case).

Police officers are not the only persons susceptible to developing this rush-to-judgment attitude.

"Mr. Justice Douglas recognized this fact when he wrote.". . .

. . .

"'[T]he police officer, the witness, the prosecutor, the juror, and even the judge - become overzealous in their concern that criminals be brought to justice. And at times there is a venal combination between the police and a witness.' Foreword, J. Frank & B. Frank, Not Guilty 11-12 (1957)." Furman v. Georgia, 408 U.S. 238, 368 n. 158, 92 S.Ct. 2726, 2792, n. 158 (1972).

Though This Court has long recognized that Fourth Amendment rights apply to civil as well as criminal situations and though state self-help repossession laws specifically require that if the debtor objects the repossessor must pursue judicial process to effect the repossession, the lower courts have not ruled consistent with those well-established laws. In fact, there would seem to be considerable resistance on the part of the lower courts to grant Fourth Amendment protection to those wrongfully deprived of their property in police assisted self-help repossessions.

In Soldal v. County of Cook, 942 F.2d 1073 (1991), a closely related self-help eviction case in which frequent reference is made to repossessions, This Court likely recalls Circuit Judge Easterbrooks' comments on why the unlawful seizure of the Soldals' mobile home did not violate the Fourth Amendment. While specifically joining the opinion (Id., at 1080) which found:

> "The eviction was unlawful, and Soldal had a common law right to resist it forcibly, although his right was limited to using mild force. The deputy sheriffs prevented Soldal from exercising his right," Id., at 1075,

Judge Easterbrook concluded,

> "*All the sheriffs' deputies did was stand by* while the landlord's employees disconnected the trailer's utilities and removed it from their lot." Id., at 1081. (Easterbrook, Circuit Judge, concurring) (emphasis added).

Apparently Judge Easterbrook felt that preventing Soldal from exercising his right to resist the unlawful seizure of his mobile home was all part of the ordinary practice of standing by during a civil situation. He continues:

> " If this is a 'seizure' of any kind by the deputies, [(citation omitted)] it is problematic only because state law specifies that a court order precede eviction. Indeed, *the only reason* why the removal of the mobile home is said to be "unreasonable" is that it *violated state law*." Id., at 1081. (emphasis added)

While Judge Easterbrook found the violation of the law insufficient to make the action unreasonable (the Fourth Amendment standard), this stands in sharp contrast to This Court's finding.

"We fail to see how being unceremoniously dispossessed of

one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment." Soldal, supra, 506 U.S. at 61, 113 S.Ct. at 543.

After This Court's ruling in Soldal, the Sixth Circuit reviewed a self-help repossession case in which it properly concluded,"

> "In the pending case, H.E.I. enjoyed a clearly-established right not to have property in which it enjoyed a lawful possessory interest seized by state action in violation of the constitution." Haverstick, supra at 994.

The Sixth Circuit also found the Romulus Police Department had dispatched Officer Hlinak to "stand by" at the scene of the repossession of a wrecker to "ensure that it would transpire in an orderly, peaceful, and lawful manner." Id., at 992.

> "Upon arriving at the H.E.I. premises the defendants observed the wrecker inside a fenced area enclosed by an unlocked gate. After a brief conversation with Fahl and Hlinak, plaintiff Glenn Belcher, who tended the H.E.I. office and garage on that day, locked the gate to the enclosure and secured himself inside the H.E.I. office. While Hlinak attempted to attract Belcher's attention by tapping on the office window, The F.F.C.I. agents commandeered the wrecker and drove it through the locked gate onto the public street." Id., at 992

Petitioners would argue that the repossessors could not possibly view their act of driving the wrecker through a locked gate as "orderly, peaceful, and lawful," yet felt comfortable to do so in the presence of a police officer. The police officer felt no obligation to tell the repossessors that since the debtor objected and resisted the repossession they needed to pursue legal process. The Petitioners would argue that creating a diversion by an accomplice to facilitate an unlawful act is a commonly employed tactic. (See Bell v. Wolfish, 441 U.S. 520, 555, 99 S.Ct. 1861, 1883 (1979). Yet the court felt this was a normal part of the "stand by" duties of police officers so that Officer Hlinak could reasonably believe his actions were lawful.

The Petitioners cite Haverstick to highlight that repossessors, police officers and the courts often view police officers' normal role

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in self-help repossessions as an affirmative rather than peacekeeping one and to demonstrate that the environment surrounding Fourth Amendment cases involving self-help repossessions is one which demonstrates the routine "tolerance of short cut methods in law enforcement." Miller v. United States, 357 U.S. 301, 313, 78 S.Ct. 1190, 1198 (1958). If repossessors were always entitled to the property they sought to repossess, such an environment might be tolerable. However, that is not the case.

This Court has ruled the state must not act to assist a repossessor until the matter is presented to the court, because...

> ..."since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides." Fuentes v. Shevin, 407 U.S. 67, 83, 92 U.S. 1983, 1995. (1972).

The Ninth Circuit reports on a similar fallibility being present in a self-help repossession case they reviewed.

> "Harris brought a state court action against Cantwell for conversion of the semi-tractor, contending that Cantwell, by accepting late payments, had waived his right to strict enforcement of the contract and had breached the peace when he repossessed the vehicle with the assistance of the city police. The jury returned a verdict in favor of Harris which was affirmed by the Oregon Court of Appeals. *Harris v. Cantwell*, 47 Or.App. 211, 644 P.2d 124 (1980)." Harris v. City of Roseburg, 664 F.2d 1121, 1124 (9th Circuit, 1981).

The normal environment in which police operate while on "stand by" during self-help repossessions is not one of neutral intervention to prevent a breach of the peace, but intervention to prevent the debtor from resisting the repossession. As the cited caselaw demonstrates, repossessors, police officers and the lower courts have routinely treated police-assisted self-help repossessions the same as repossessions obtained through judicial process.

The Fourth Amendment is "no less important than any other right carefully and particularly reserved to the people." Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692 (1961). When a similar environment threatened basic Fifth Amendment rights This Court acted in harmony with its stated policy:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 777 (1946).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602 (1966), This Court reviewed the atmosphere within which police interrogation was conducted and determined, "This atmosphere carries its own badge of intimidation." Miranda, supra. at 384 U.S. at 457, 86 S.Ct. at 1619. Although police officers may believe they are doing a noble thing by sparing the repossessor the necessity of going to court just to have a foregone conclusion affirmed,

> "'It is not admissible to do a great right by doing a little wrong. * * * It is not sufficient to do justice by obtaining a proper result by irregular or improper means.'" Id. 384 U.S. at 447, 86 S.Ct. at 1614 (Quoting Lord Sankey).

In Miranda This Court concluded the atmosphere of intimidation used to short cut justice must be corrected. Since there has been no change in the atmosphere surrounding police standby in self-help repossessions as demonstrated in the instant case and Haverstick, "there can be no assurance that practices of this nature will be eradicated in the foreseeable future," Id. at 384 U.S. at 447, 86 S.Ct. at 1613.

The Petitioners appreciate the vital role police officers play in a healthy society and are sensitive to the difficulty of carrying out their duty to enforce the law. However, simply declining to participate in blatantly unlawful activity would place no further burden on these faithful servants. Certainly a police officer would find it less stressful to tell a repossessor, "Sorry, look's like you're going to have to go to court," than to tell the debtor "stand aside, they have a right to everything in here so don't give them any trouble."

As This Court has acknowledged, bringing a §1983 action citing a violation of the Fourth Amendment when a warrant has been

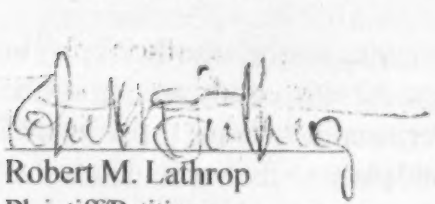
issued would be a "laborious task." Soldal, supra, 506 U.S. at 71, 113 S.Ct. at 549. The Petitioners would propose that it was, in fact, a "laborious task" for the Soldals when there was no warrant issued, the officers knew their actions were unlawful and the violation was extreme. The Soldals spent more than five years in litigation before This Court reinstated their claim. The Petitioners in the instant case have spent seven years in their efforts to be made whole and in the absence of This Court's granting certiorari will have had no opportunity to present their case to a jury. Those who have successfully affirmed these basic rights in court are indeed rare and, therefore, a §1983 action presents little, if any, real deterrent to police officers who would assist in unlawful repossessions.

The Petitioners request that, in order to create an effective deterrent to police-assisted unconstitutional seizures, This Court require police officers on standby at self-help repossessions to inform debtors of their right to resist the repossession and direct repossessors to discontinue their efforts at self-help repossession and proceed by judicial action once the debtor has objected to the repossession. Or, in the alternative, the Petitioners request This Court to set clear guidelines limiting the availability of qualified immunity to law enforcement officers who assist in actions which This Court has unanimously ruled unlawful.

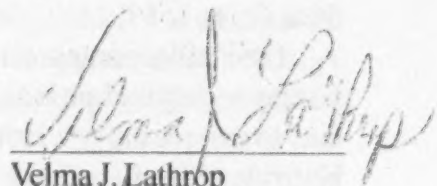
CONCLUSION

On this date, November 16, 1998, the Petitioners request their petition for Writ of Certiorari be granted.

Respectfully submitted,



Robert M. Lathrop
Plaintiff/Petitioner
3131 N.E. 49th St.
Ocala, FL 34479
(352) 629-7008



Velma J. Lathrop
Plaintiff/Petitioner
3131 N.E. 49th St.
Ocala, FL 34479
(352) 629-7008

APPENDIX

A. Circuit Court Order Affirming Summary Judgment 31
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PERMANENT

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 03 1998
THOMAS K. KAHN
CLERK

No. 97-3263
Non-Argument Calendar

D. C. Docket No. 95-232-Civ-Oc-10C

COTTAGE INDUSTRIES, INC.,
ROBERT M. LATHROP, Husband,
VELMA J. LATHROP, Wife,

Plaintiffs-Appellants,

versus

DAVID HANCOCK,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 3, 1998)

Before ANDERSON, COX and DUBINA, Circuit Judges.

PER CURIAM:

The plaintiffs appeal the district court's grant of summary judgment in favor of the defendant Hancock on the ground that Hancock enjoyed qualified immunity.

The district court properly concluded that Hancock could reasonably have believed that his conduct was lawful, *see Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir. 1992), and therefore that Hancock was entitled to qualified immunity.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Ocala Division

APR 10 1997
FILED
s/"AP"
97 APR10 PM 3:06
CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

Cottage Industries, Inc., et al,
Plaintiffs,

JUDGMENT IN A CIVIL CASE

V.

David Hancock,
Defendant.

CASE NUMBER: 95-232-Civ-Oc-10C

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the court's order issued this date, judgment is entered in favor of the defendant and against the plaintiffs.

April 9. 1997
Date

RICHARD D. SLETTEN
Clerk

"s/ Amanda Pauley"
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

COTTAGE INDUSTRIES, INC., et al,
Plaintiffs,

-vs- CASE NO: 95-232-Civ-Oc-10C

DAVID HANCOCK,
Defendant.
_____/

APR 10 1997
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CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

ORDER

The Plaintiffs brought this 42 U.S.C. §1983 suit against the Defendant, an investigator with the Ocala Police Department, alleging that he violated their Fourth Amendment rights by assisting in the seizure of their property. The case is before the Court on the Defendant's motion for summary judgment (Doc. 16). The facts of the case are, in general, not in dispute and can be summarized as follows.

BACKGROUND FACTS

The Plaintiffs Velma J. and Robert M. Lathrop (the "Lathrops" or "Mrs. Lathrop" or "Mr. Lathrop") formed and are the sole stockholders of the Plaintiff Cottage Industries, Inc. ("Cottage Industries"), which is a corporation that performs typesetting services. In October of 1991, the Plaintiffs purchased a business known as "Superior Typesetting" from Michael Lowery ("Lowery"), the president or owner of a corporation known as Miracle Life Christian Center, Inc. Through that purchase, Cottage Industries became the successor business to Superior Typesetting, acquiring all of the assets of the business, including software programs, fonts, and customer files. In addition, the purchase included an option to assume a lease on an Apple MacIntosh computer and laser printer.

Within days of purchasing the business, the Plaintiffs were contacted by one or more creditors of Superior Typesetting demanding payment on delinquent accounts. Relevant to these demands is the fact that Lowery had recently purchased the business from its founders Tammy Garst Pinto ("Pinto") and Keith T. Garst. Pinto and Mr. Garst had operated the business for approximately seven years and had sold it to Lowery in March of 1991.

It quickly became apparent to the Lathrops that some of the equipment of the business was still in the name of Pinto. Specifically, Apple Credit notified the Plaintiffs that three or more lease payments were delinquent and the computer would be repossessed if payments were not made current. In addition, Apple Credit informed the Lathrops that the lease on the computer was still personally guaranteed to (and by) Pinto. As such, the Lathrops contacted Pinto to give her the option of reassuming the lease if the Plaintiffs chose not to assume it themselves. In talking to Pinto, the Plaintiffs learned that she had not been paid in full for the business as Lowery had told the Plaintiffs. In addition, Pinto stated that she planned to repossess the business equipment, noting that she had already sent notice of her intent to Lowery. The Plaintiffs then found the original signed Agreement of Sale between Pinto and Lowery and learned that Pinto had no lien against the equipment or the business. The Plaintiffs advised Pinto of this fact and told her to get a judgment against Lowery in order to attach the Plaintiffs' payments to Lowery.

Pinto subsequently, within a few days of first speaking to the Lathrops, travelled to Ocala and met with them. Then, on October 29, 1991, the Lathrops and Pinto went to the State Attorney's Office to discuss the alleged fraud committed by Lowery. At the State Attorney's Office they met with Assistant State Attorney Pat Jackson ("Jackson") I who advised them to see a civil attorney to determine who owned the business, and to make a complaint with the Ocala Police Department so that an investigation into the fraud allegation could be made. On October 29 or 30, 1991, Officer Scaglione and his supervisor officer Morrison of the Ocala Police Department initially investigated the Lathrops' and Pinto's complaint. The officers received documents and interviewed the Lathrops and Pinto. In addition, the officers communicated with Lowery's attor-

ney, John Welch. On October 30 or 31, 1991, it was decided that an investigator would be needed, and the Defendant David Hancock ("Hancock") became involved in the case for the first time. The Defendant's initial meeting with the Lathrops and Pinto took place approximately one week before the alleged wrongful repossession. It appears that the group discussed Lowery's alleged fraud, but not the civil matter of who owned the business and/or the assets of the business. Hancock also received reports from Scaglione and Morrison describing their involvement in the case up to that point.

On Friday, November 1, 1991, Hancock filed grand theft charges against Lowery for taking the Lathrops, money and obtained a warrant for his arrest. Also on November 1, 1991, Mrs. Lathrop and Pinto met with a private attorney, Dennis Camp, to determine their options as to ownership of the business. On Monday, November 4, 1991, Mr. Camp opined to Mrs. Lathrop and Pinto that the business legally and rightfully belonged to the Lathrops.

Throughout her one and one half week visit to Ocala, Pinto had stated that she just wanted to get her "stuff," i.e., the business property, and leave. Of course, the Lathrops and now Mr. Camp advised Pinto that she could not do so. At the same time, the Lathrops and Pinto were working together against Lowery and everyone involved viewed them as being on the "same side." In addition, it was the opinion of Jackson and the State Attorney's Office that Pinto owned or had some right to all or a part of the property. Jackson had passed this opinion on to Hancock, who based his course of conduct on the belief that Pinto owned the property. In addition to Jackson's opinion as to rights to the property, Hancock himself received a copy of the sales contracts between Pinto and Lowery and between Lowery and the Lathrops. And, pursuant to the contract between Pinto and Lowery, Hancock apparently believed that Pinto had, by sending notice of her intent to do so after Lowery had defaulted on his payments to her, a right to repossess the assets of the business.

THE INCIDENT

As such, there was a difference of opinion as to who owned the business and its assets, but, up to this point, the Lowerys [sic.] and Pinto had maintained friendly relations. The friendly relationship

ended, however, on Tuesday morning, November 5, 1991. Sometime prior to the fifth, Mrs. Lathrop had apparently called Hancock to inform him that she had received a bank statement that included several bad checks written by Lowery. At approximately 10:00 a.m. on November 5, 1991, Hancock went to the Lathrops' business to pick up the checks. A short time later,[1] Pinto and others arrived at the Lathrops' business with a U-Haul truck and began removing property from the business. Mrs. Lathrop told Hancock that she wanted Pinto and the others off of her property, that she wanted the door locked until she could call someone, and that she wanted Pinto and the others arrested for trespassing. Hancock told Mrs. Lathrop not to give Pinto any trouble and to stay behind the counter. He also told Mrs. Lathrop not to lock the door because the property belonged to Pinto. Mrs. Lathrop then called Jackson at the State Attorney's Office and she and Hancock spoke with Jackson. Jackson advised that Pinto had a right to be on the property until Mrs. Lathrop objected, at which time Pinto was required to obtain a writ of replevin to continue removing property. After this information was explained to Pinto, she and the others left, but did not return any of the items that had already been loaded into the U-Haul.

PROCEDURAL HISTORY

The Plaintiffs Mr. and Mrs. Lathrop filed a state court action against Lowery, Pinto, Bonnie Huber, Miracle Life Christian Center, Inc., and the Ocala Police Department (but not against Hancock, the Defendant in this case). The complaint included two negligence counts and a 42 U.S.C. §1983 count against the Ocala Police Department, predicated upon the alleged wrongful acts of Hancock

[1] The Plaintiffs argue that Pinto told Hancock that she planned to take the business equipment home with her and that Hancock arranged to be at the Lathrops, business at the time when Pinto carried out that plan. Even taking the evidence in a light most favorable to the Plaintiffs, there has been no showing that Hancock planned or arranged to be at the Lathrops, business when Pinto arrived to pick up the equipment. It may have been that Hancock told Pinto that he would be there to pick up the bad checks at a certain time, but no evidence presented to this Court demonstrates that the two planned to meet at the business.

during Pinto's taking of the business property. That action was settled and voluntarily dismissed by the Plaintiffs. The Plaintiffs now bring their amended complaint in this Court against Hancock only, alleging a §1983 claim for violation of the Plaintiffs' Fourth Amendment rights.

The Defendant has filed a motion for summary judgment (Doc. 16), as well as a statement of undisputed facts (Doc. 17). The Defendant makes four arguments in support of his motion for summary judgment: 1) that the Defendant's conduct does not rise to the level of a constitutional tort as a matter of law; 2) that the Defendant is entitled to qualified immunity; 3) that the Plaintiffs, cause of action is barred by the doctrine of res judicata; and 4) that the Plaintiffs, cause of action is barred by the rule against splitting causes of action. The Plaintiffs have responded in opposition (Doc. 29), and have filed a response to the Defendant's statement of undisputed facts (Doc. 35).

LEGAL CONCLUSION

The Court concludes that the Defendant is entitled to qualified immunity and his motion for summary judgment is due to be granted. The qualified immunity shield protects government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Hutton v. Strickland, 919 F.2d 1531, 1535-36 (11th Cir. 1990) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). The doctrine was established by the Supreme Court to protect "all but the plainly incompetent or those who knowingly violate the law," Malley v. Briggs, 475 U.S. 335, 344-46, 106 S.Ct. 1092, 1097-98, 89 L.Ed.2d 271 (1986); and the officials conduct is to be measured by the "objective legal reasonableness" of the action taken. Harlow, 457 U.S. at 819, 102 S.Ct. at 2739. See also Anderson v. Creighton, 483 U.S. 635, 638-39, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

In undertaking the decision making process concerning the issue of qualified immunity, the Defendant must first establish that he was acting within the scope of his discretionary authority as an official of the state when the allegedly wrongful acts occurred. The

burden then shifts back to the Plaintiffs to show the Defendant violated clearly established law in committing those acts. Hutton, 919 F.2d at 1537 (citing Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988) and Hudgins v. City of Ashburn, 890 F.2d 396 (11th Cir. 1989)).

The first prong of this analysis -- that the Defendant was acting within the scope of his discretionary authority as a state official is not disputed in this case.[2] The second prong of the analysis -- that the Defendant violated clearly established law -- has not been established by the Plaintiffs.

Whether governing law was "clearly established" requires an examination of the constitutional basis of the Plaintiffs' claim as well as other relevant case law. Anderson v. Creighton, 483 U.S. at 639-40, 107 S.Ct. at 3038-39. Here, it is apparent that the law was not, and in fact still is not, clearly established with regard to the Plaintiff's allegations. They have not presented a case involving similar facts in which a defendant was found to have violated the Fourth Amendment. Hancock was at the Lathrops' business to pick up checks, not to aid in or assist in a repossession. In fact, it appears that Hancock did not view what was happening as a true hostile repossession. It is uncontroverted that he believed that the property belonged to Pinto and that she had a right to retrieve it. Once he learned that Pinto's actions were unlawful, he instructed her to leave. This is not like the typical police officer/repossession case where the police officer is on the scene specifically because a repossession is going to take place and then the officer somehow gets involved in the actual repossession. Hancock reasonably believed, based on Jackson's opinion and his own reading of the contracts of sale, that Pinto was simply retrieving her property, and he himself took no part in the actual taking of property. He simply advised Mrs. Lathrop not to interfere.

The Plaintiffs argue that Hancock may not use Jackson's opinion as a basis for believing the property belonged to Pinto because

---

[2] The Court also seriously questions whether or not there is state action in this case. It is not at all clear to the Court that the Defendant aided in the taking of the property. Even if he did, however, he is entitled to qualified immunity.

Hancock did not provide Jackson with all the facts of the case, including the fact that the Lathrops and Pinto were in disagreement over who owned the property. However, it is clear that everyone, including Jackson, knew that there was a disagreement over ownership rights to the property, but believed that the Lathrops and Pinto were working together and were on friendly terms. And, there is no evidence that Hancock knew more about the disagreement or the state of the relationship between the Lathrops and Pinto. It is true that Pinto called Hancock and discussed taking the property back and whether or not she would have a problem doing so, and that Hancock said he did not think there would be a problem. This conversation, however, only highlights the fact that Hancock did not believe that there had been a breakdown in the relationship between the Lathrops and Pinto. His basis for stating that he did not believe there would be a problem with Pinto taking the property was the fact that he believed she was entitled to the property and he thought that the Lathrops and Pinto had worked out an arrangement for Pinto to retrieve it.

In sum, Hancock acted under the belief that Pinto had a right to take the property, and that the Lathrops and Pinto were still on friendly terms and had agreed to Pinto removing the property. Even after Mrs. Lathrop objected, Hancock was still under the impression, apparently based on his conversations with Jackson and his reading of the contracts, that Pinto had a right to the property. In addition, the call was made to Jackson and the property removal ceased soon after Mrs. Lathrop first protested to Hancock. The Plaintiffs have failed to cite any prior decision involving similar facts in which a court has held that, based upon such facts, an officer violated someone's Fourth Amendment rights. It follows that "a reasonable officer could have believed (that his actions were] lawful, in light of clearly established law and the information [he] possessed." Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). See also Foy v. Holston, 94 F.3d 1528, 1534 (11th Cir. 1996); Sims v. Metro. Dade County, 972 F.2d 1230, 1234 (11th Cir. 1992); Hardin v. Hayes, 957 F.2d 845, 848 (11th Cir. 1992) ("[W]e look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly es-

tablished law and the information possessed by the official at the time the conduct occurred."); Williams v. City of Albany, 936 F.2d 1256, 1259 (11th Cir. 1991). It is undisputed that Hancock believed that the property belonged to Pinto. Just one day prior to the incident Jackson had told him that it did belong to Pinto. In addition, Hancock knew that Pinto had sent notice of her intent to repossess the business to Lowery and believed that the business and its assets had reverted back to Pinto. In fact, Hancock believed that Pinto had the right to order the Lathrops off of the property. Even if Hancock was aware that attorney Camp had opined that the property belonged to the Lathrops, his belief in and reliance on Jackson's opinion was not unreasonable. Hancock's only "participation" in the taking of the property was telling Mrs. Lathrop not to stop Pinto because it was her property and she had a right to it. Jackson, in his conversation with Mrs. Lathrop and/or Hancock, stated the same opinion until he learned that Mrs. Lathrop had objected to the removal — at which time he stated, for the first time, that Pinto would need a writ of replevin. The fact that Hancock did not become involved in what he viewed as a civil dispute and stop the removal at Mrs. Lathrop's first objection does not demonstrate incompetence and is clearly within the bounds of reasonable behavior protected by qualified immunity.

Accordingly, upon due consideration, the Defendant is entitled to qualified immunity and his motion for summary judgment (Doc. 16) is GRANTED, and the Clerk is directed to enter judgment in favor of the Defendant and against the Plaintiff and to close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this 9th day of April, 1997.

"s/ W. Terrell Hodges"
UNITED STATES DISTRICT JUDGE

Copy to counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3263

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 18 1998
THOMAS K. KAHN
CLERK

COTTAGE INDUSTRIES, INC.,
ROBERT M. LATHROP, Husband,
ETC., ET AL,
Plaintiffs-Appellants,

versus

DAVID HANCOCK,
Defendant-Appellee.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(opinion _____, 11th Cir., 19___, _____ F.2d _____).

Before: ANDERSON, COX and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

"s/ E.R. Cox"
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Ocala Division

Cottage Industries, Inc., et al,

Plaintiffs,

-vs- CASE NO. 95-232-Civ-Oc-10C

DAVID HANCOCK,
Defendant.
_____/

SEP 15 1997
FILED

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CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

ORDER

This case is before the Court on several motions: (1) The Plaintiffs' Motion for Reconsideration and to Amend Judgment (Doc. 41) and the Defendant's response (Doc. 44); (2) The Defendant's Motion to Strike; (Doc. 45) and (3) The Plaintiff's Motion to Strike the Defendant's.Response (Doc. 46).

PROCEDURAL BACKGROUND

The Plaintiffs brought this 42 U.S.C. § 1983 suit against the Defendant, an investigator with the Ocala Police Department, alleging that he violated their Fourth Amendment rights by assisting in the seizure of their property. (Doc. 3). The case was originally brought in state court and was then removed to this Court. (Doc. 1). The Defendant then moved for summary judgment, which the Court granted based on the doctrine of qualified immunity. (Doc. 39). From this Order, the Plaintiffs have moved for reconsideration.

STANDARD OF REVIEW

The reconsideration of a previous order is an "extraordinary remedy to be employed sparingly. Sussman v. Salem, Saxon & Nielson, P.A., 153 F.R.D. 6 8 9, 6 94 (M. D. Fla. 1994). A motion for reconsideration brought under Federal Rule of Civil Procedure

59(e) must demonstrate why the Court should reconsider its prior decision and "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Cover v. Wal-Mart Stores, Inc., 148 F.R.D. 294 (M.D. Fla. 1993). The Court "will not alter a prior decision absent a showing of 'clear and obvious error, where 'the interests of justice, demand correction." Prudential Securities, Inc. v. Emerson, 919 F.Supp. 415 (M.D. Fla. 1996) (quoting American Home Assurance Co. v. Glenn Estess & Assoc., Inc., 763 F.2d 1237, 1239 n.2 (11th Cir. 198S)). Courts have recognized three grounds which support a motion for reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981) ; Sussman, 153 F.R.D. at 694. A previous ruling will not be reconsidered when the motion fails to raise new issues and instead only relitigates what has already been found to be lacking. Gov't. Personnel Serv., Inc. v. Gov't. Personnel Mut. Life Ins. Co., 759 F.Supp. 792 (M.D.Fla. 1991), aff'd., 986 F.2d 506 (11th Cir. 1993) Furthermore, motions for reconsideration "should not be used to raise arguments which could, and should, have been made" at the outset. Prudential, 919 F.Supp. at 417. The failure of a party to present its strongest case in the first instance generally precludes their right to raise new theories or arguments in a motion for reconsideration. Renfro v. City of Emporia, Kan., 732 F.Supp. 1116, 1117 (D.Kan. 1990) , aff'd. , 948 F.2d 1529 (10th Cir. 1991) , cert. dismissed, 503 U.S. 915, 112 S.Ct. 1310, 117 L.Ed.2d 510 (1992) . Furthermore, the refusal to grant relief in a motion for reconsideration is reviewed under an abuse of discretion standard. See In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1543 (11th Cir. 1987).

DISCUSSION

The Plaintiffs, motion for reconsideration and to amend judgment not only fails to assert a change in controlling law, but it also lacks any evidence of new facts which would compel the Court to reverse or modify its prior decision. Therefore, the only issue before the Court is whether its previous Order was clearly and obviously erroneous such that "the interests of justice, demand correc-

tion." Prudential, 919 F.Supp. at 415.

To that end, the Plaintiffs assert that the Court failed to give appropriate consideration to the evidence and therefore concluded erroneously that the Defendant did not plan or arrange to be at the Plaintiffs' business when Tammy Pinto (Pinto) arrived to pick up the Plaintiffs' equipment. Due to this error, the Plaintiffs argue that the Court disregarded relevant caselaw which when analyzed in light of the instant facts, would demonstrate that summary judgment was inappropriate.[1] The Court does not find this argument persuasive. In its order granting summary judgment, the Court carefully considered all the evidence offered by both parties. The Court stands by its previous conclusions.

Even if the facts indicated collusion between the Defendant and Pinto, summary judgment would still be appropriate since the Plaintiffs have simply failed to prove that the Defendant's actions violated clearly established law.[2] In both their motion for reconsideration and their response to the Defendant's motion for summary judgment, the Plaintiffs rely on decisions from the Ninth, Seventh and Fifth Circuits. In this circuit, decisions from other circuit courts cannot clearly establish the law for purposes of qualified immunity. See, e.g., D'Aguanno v. Gallagher, 50 F.3d 877, 881 n.6 (11th Cir. 1995) ("The remaining cases on which plaintiffs rely do not come from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the Florida Supreme Court and, therefore, cannot show that plaintiffs' right to due process was clearly established.");

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[1] Because the Court can dispose of the Plaintiffs' motion for reconsideration on the issue of qualified immunity, it will not address the Plaintiffs' other arguments, which were previously raised in their response to the Defendant's motion for summary judgment.

[2] The Court notes that the determination of whether the law was "clearly established" is a question of law, separate from the factual determination of the Defendant's conduct. Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." See Mitchell v. Forsyth, 472 U.S. 511, 528, 105 S.Ct. 2806, 2816-17, 86 L.Ed.2d 411 (1985); Harlow v. Fitzgerald, 457 U.S., at 818, 102 S.Ct., at 2738.

Courson v. McMillian, 939 F.2d 1479, 1497-98 & n. 32 (11th Cir. 1991) (for qualified immunity purposes, the law can be "clearly established" by decisions of the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or highest court of the state where the case arose). The only decision which has any binding effect on the Defendant is the Fifth Circuit decision, Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (1980), in which the court held in a situation factually similar to the instant case that there was no state action.[3] As the Plaintiffs have not put forth any new binding caselaw on this subject, it is apparent that the law was not clearly established with regard to the facts of this case.[4]

CONCLUSION

Accordingly, upon due consideration:

1) The Plaintiffs' motion for reconsideration (Doc. 41) is DENIED.

2) The Defendant's motion to strike (Doc. 45) is DENIED.

3) The Plaintiffs' motion to strike Defendant's response to Plaintiffs, motion for reconsideration (Doc. 46) is DENIED.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this 12th day of September, 1997.

"s/ W. Terrell Hodges"
UNITED STATES DISTRICT JUDGE

Copy to counsel of record

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[3] In Menchaca, the police officers were summoned by the persons repossessing the Plaintiff's car after the Plaintiff attempted to stop the repossession. The officers spoke with the Plaintiff and told him that he could not prevent the repossession and that the Plaintiff would be arrested for breach of the peace if he did not stop using loud and abusive language. Menchaca, 613 F.2d at 510. The court found that this conduct did not constitute "police intervention and aid in this repossession." Id. at 513.

[4] Given the Eleventh Circuit's recent decision in Cofield v. Randolph County Commission, 90 F.3d 468 (11th Cir. 1996), it would appear that had this incident occured today, the Defendant most assuredly would not have violated clearly established law.